Dickinson Law Review - Volume 14, Issue 8

DICKINSON LAW REVIEW

Vol. XIV MAY, 1910 No. 8

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Subsbription $1.25 per annum, payable in advance.

CHECKS.

(Last sub-division.)

EXCUSES FOR NOT HONORING CHECK. EXCEEDS THE DEPOSIT.

The bank is not under obligation to pay a check or any part of it, if it exceeds the amount on dedosit at the time of its presentment. Yet in Bromley v. Commercial National Bank of Pennsylvania[1] it is said by Pierce, J., that if the holder of the check is willing to receive the smaller sum, the bank should pay him it. The bank will retain the check, but should endorse upon it the amount paid and issue to the holder a certificate of having received the check and of having paid so much upon it. The holder may also deposit with the bank enough to equal the check and, if he does so, the bank ought to pay the check.

DEPOSIT BELONGS TO ANOTHER.

When the bank receives from X a deposit and issues to him the customary credential, it cannot refuse to pay it out to others on his checks, or to pay it back to him on his check, payable to himself, on the ground that the money really belongs to some body else than X, unless the money in fact belongs to another, and that other has notified the bank not to pay it to X, or,

[1] 9 Phila. 522. Cf. Johnston v. Parker Savings Bank, 101 Pa., 597, where it is suggested that a bank not having funds of the drawer of a check may receive it and agree to hold it until funds come in, and then to pay it. In Penn Bank's Assigned Estate, 165 Pa. 548, bank A had a check for $88,000 on Bank B. which B could not pay in full. A agreed to lend $40,000 to B to enable it to pay. The security for the loan was notes of the B bank's directors.

unless, belonging to another, a creditor of that other has attached it as his.[2] The bank cannot, *sua sponte*, allege the ownership of another, and for that reason, refuse to recognize the right of the depositor to withdraw the money, even though it has claims against the other, which, by retaining the money, it might satisfy.[3] The money being deposited by T. H. Patterson, "as agent," the bank must pay it to him, unless those for whom he is agent have a right to the money, and notify it not to pay it to him. The burden is on the bank to prove these facts.[4]

CHECKS NOT DRAWN BY PROPER PERSON.

If a partnership, A & B, make deposits, and the bank is notified that all checks upon these deposits will be signed by both partners, the bank will properly refuse to honor checks not so signed, unless the partners waive the requirement. If the bank pays out money on check, signed by A alone, it will not be entitled to credit, unless the money is actually used by A in legitimate partnership transactions, as against B, the other member of the firm, or as against creditors of the firm who have attached the deposit.[5] The fact that A makes deposit of B's money in the bank informing the bank that it is B's, does not authorize A to draw checks upon it in B's name. Authority to deposit is not authority to draw out. Hence B can recover the money from the bank notwithstanding that the bank has paid it out on A's check.[6] But the bank will be entitled to a credit for so much of the money drawn out by A, as he has used in paying B's debts.

CHECKS REVOKED BY DEATH.

The death of a drawer of a check revokes it, so far as the bank upon which it is drawn is concerned. The bank has no right to pay it thereafter.[7] It seems, says Pierce, J., "that the death of a drawer of a check is a countermand of the banker's authority to pay it. But that if the banker do pay the check before notice of the death, the payment is good."[8] "Where a check is

[2]Hemphill v. Yerkes, 132 Pa. 545; First Nat. Bank v. Mason, 95 Pa. 113.

[3]95 Pa. 113.

[4]Patterson v. Marine Nat. Bank, 130 Pa. 419.

[5]Smelting Co. v. Laverty, 159 Pa. 287.

[6]Fletcher v. Integrity Ins. Co. 31 W. N. 503; Kerr v Peoples' Bank, 158 Pa. 306.

[7]Saylor v. Bushong 100 Pa. 23.

[8]Bromley v. Nat. Bank, 9 Phila. 522.

not regarded as an assignment, it has been said that the death of the drawer will work a revocation; but, notwithstanding this, if a bank pay a check after the drawer's death, and before learning of the event, it is not liable. In those jurisdictions, however, where the check operates as an assignment, it would seem that the drawer's death would have no such effect.'[9]

CHECKS REVOKED BY COUNTERMAND.

Until the bank upon which a check is drawn accepts it, certifies it, or in some way becomes bound to pay it, to the holder[10] or until the bank actually pays the check[11] it may be countermanded by the drawer, and payment of it, after such countermand, would expose the bank to an action by the drawer, for the amount thus paid out.[12] If however the bank pays the check before receiving notice not to pay, it will be entitled to credit against the deposit of the drawer.[13] Although stoppage of payment may injure the holder, he will have no redress from the bank, e.g. in a case in which the drawer becomes insolvent, after the issue of the check, and in which the payee if he does not secure payment from the bank, will be unable to abtain it at all.[14] Refusal to pay a check after countermand of it, exposes the bank to no action by the holder[15] but the drawer of the check remains liable upon it.[16]

CHECK AS AN APPROPRIATION OR ASSIGNMENT.

That a depositor in a bank does not by the delivery of a check drawn on the depositary bank to X assign so much of the deposit as equals the amount of the check is well established. Such a check is payable not simply from moneys at the time of its making in the bank, but out of any that may be in the bank at the

[9]5 Cyc. 540. It is said that the holder of a check ought to have a remedy against the bank which refuses to pay it, if it has impliedly promised by its usage, to pay checks. Saylor v. Bushong; 100 Pa. 23.

[10]There can be no effectual countermand thereafter, Northumberland Bank v. McMichael, 106 Pa. 460.

[11]After actual payment, there can be no countermand, 118 Pa. 294. The holder of a check sues the bank on which it was drawn, alleging payment and, by means of a false pretext, the surrender of the payment. The alleged payment being found not to be a true payment, the action was defeated.

[12]German Nat. Bank v. Farmers' D. Nat. Bank, 118 Pa. 294.

[13]Id.

[14]100 Pa. 23.

[15]Saylor v. Bushong, 100 Pa. 23.

[16]Matthews v. Fœderer, 19 Phila. 295.

time of its presentment for payment. It does not constitute the payee the owner of the money which is in the bank when it is delivered, nor lessen the power or right of the drawer to make some other appropriation of that money.[17] Hence, one who holds a check, at the time when an attachment in execution against the drawer attaching the bank deposit is served upon the bank, which check has not been presented to the bank, is not entitled to so much of the deposit as equals the check, or any less amount of it, as against the attaching creditor. Check drawn October 23d. On October 27th a creditor of the drawer issues an attachment execution which is served the same day on the bank. Two days later the check is presented to the bank for payment. The bank will properly refuse to pay it. It will be obliged to pay the attaching creditor, even though it pays the holder of the check.[18] A draws a check upon his banker X, in favor of B. The three agree that if any attachment should be levied upon the fund for A's debt, the amount of the check should be immediately passed to B's credit, and a corresponding charge made against A's account. An attachment execution subsequently issued, and was served upon X, and thereupon X gave credit to B for the amount of the check, and charged the amount against A's account. A had on deposit only $4,779.72 and the check was for $10,000. The charging of the check against him made his account overdrawn to the extent of $5,220.28. He made his account good the same day by depositing this amount. It was held that the attachment took the $4,779.72. The bank's agreement to transfer the money to B, was not executed until after the service of the attachment. The agreement itself was not equivalent to an assignment. Nor did it raise a trust. If it raised a trust it was a trust for the benefit of A, until the contingency of the issue of the attachment. Although another person might have created such a trust for A he could not do it himself. The trust would be void, as to him, and also as to B.[19]

[17]Loyd v. McCaffrey 46 Pa. 410; First Nat. Bank v. Shoemaker, 117 Pa. 94; Roberts v. Boyle, 8 York 13; Brosius v. Cloud, 1 Ch. 333; Hemphill v. Yerkes, 132 Pa. 545. But Bromley v. Commercial Nat. Bank, 9 Phila. 522, tacitly assumes that a check was an appropriation.

[18]Kuhn v. Warren Saving Bank, 20 W. N. C. 230; Roberts v. Boyle, 8 York 13; Harry v. Wood, 2 Miles 327. If a check is payable to A who endorses it to B prior to the service of an attachment on the bank, for A's debt, B will be entitled to the money; Hemphill v. Yerkes, 132 Pa. 545.

[19]Loyd v. McCaffrey 46 Pa. 410.

COMPETITION BETWEEN HOLDER OF CHECK AND ASSIGNEE.

If after the delivery of a check by A he makes an assignment in trust for the benefit of creditors, before the check is presented to the bank for payment, the money in the bank will belong to the assignee, and not to the holder of the check. Of such a check, Sterrett, J., remarked: "It designated no particular fund out of which it was to be paid; contained no words importing a transfer of the whole or any part of the balance then standing to the credit of the drawer nor did it even correspond in amount with that balance. It is well settled that such a check or draft, without more, is neither a legal nor equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. It gives the payee no right of action against the drawee, nor any valid claim to the funds of the drawer in his hands. If before acceptance or payment of the draft, the drawer executes a voluntary assignment for the benefit of creditors, as was done in this case, the funds in the hands of the drawee pass by the assignment as assets of the insolvent's estate to his asignees in trust for creditors."[20] As the money on deposit passes to the depositor's voluntary assignee in trust, under an assignment, made after the assignor's issue of a check, but before the presentment of the check to the bank, so, it will pass, on the supersedure of this assignee by a proceeding in bankruptcy, to the bankrupt assignee.[21]

CHECK THE INSTRUMENT OF AN ASSIGNMENT.

The check may be the means of making an assignment of the fund in bank. M as master, appointed to make sale of land, had deposited the proceeds of the sale in bank. He had paid the shares of all but X, to whom the balance, $634.14. equitably belonged. In order to transfer this money to X, M drew a check payable to him for it. The court found that this was an assignment of the fund.[22]

[20]Jordan's Appeal, 10 W. N. C. 37; Eby's Assigned Estate, 5 Lanc. 389.

[21] First Nat. Bank of Mt. Joy v. Gish, 72 Pa. 13. In Fulweiler v. Hughes, 17 Pa. 440, A drew a check in favor of B. A creditor of B, obtaining a judgment, issued an attachment and attached the debt in the hands of A. The bank then refused to pay the check, to an endorsee.

[22]Hemphill v. Yerkes, 132 Pa. 545. X however was already the equitable owner of the fund.—Cf. Assigned Estate of Nat. Fire Ins. Co., 8 W. N. C. 436, 14 Phila. 149, where as against the drawer of the check who subsequently withdrew his funds from the bank before the check was paid, and after it had been retained some time by the bank, the payee of the check was held entitled to the money.

CHECK PAYABLE TO DEPOSITARY BANK ITSELF.

The depositor may draw a check upon his bank, which indicates on its face, his intention that the money called for by it, shall be applied in discharge of a debt due by the drawer to the bank. Such a check is an appropriation of the amount of the deposit equal to the amount of the check, from the time of its presentment to the bank. The bank cannot refuse to accept it as payment.[23]

FACTS NOT EQUIVALENT TO APPROPRIATION.

So long as the depositor has the right to require the bank to pay upon his direction or order, the deposit cannot be considered as having been assigned. Even if, after drawing a check, payable to X, the drawer informs the bank that he intends that it be paid out of the deposit or directs the bank so to apply the money, until the money is actually applied to the check, the direction is revocable.[24] The mere fact that the check is for the exact sum on deposit, at the time it is drawn, is sometimes assumed insufficent to prove an intention to assign. A having reduced his deposit to $260 drew a check for $260. It was not deemed an assignment.[25] But the equality of the sum on deposit with the amount of the check may, in conjunction with other circumstances, indicate the intention to assign. In Ruffle's Appeal[26] A having on deposit $650, and, being about to die, expressed the desire to give the money to his step-mother. A check for that amount was drawn by a friend and subscribed with A's mark. Payment of the check was declined by the bank, because there was no subscribing witness. After A's death, the step-mother was allowed to recover the amount from the estate, the bank having paid it to the administratrix; that is, it was held that there had been an executed gift.

BANK NOT LIABLE TO HOLDER.

The fact that A, having a deposit in bank, draws a check upon it, payable to B, which he delivers to B, does not entitle B to sue the bank for the amount or for any amount, if the bank disregards the order contained in the check. He must look

[23]Laubach v. Leibert 87 Pa. 55.

[24]Roberts v. Boyle, 8 York 13.

[25]First Nat. Bank of Mt. Joy v. Gish, 72 Pa. 13; Cf. Maginn v. Dollar Savings Bank, 131 Pa. 362.

[26]154 Pa. 183.

solely to the drawer.[27] This is so though the deposit in the bank is ample.[28] Indirect liability by set-off perhaps does not exist. In Mountain City Banking Co. v. Moyer[29] the bank having become insolvent and passed into the hands of a receiver, held a note drawn by X, and endorsed by Y. After the assignment X obtained the check of a depositor in the bank, for amount greater than the note drawn on the depository bank. The check was refused. To obtain the check X had given to the depositor his promissory note for like amount. X failing to secure the accepting of the check as payment by the assignee, returned the check to the drawer, and received back his note. Hence, at the trial, of the action on the note against Y, neither X nor Y, could make a good tender of the check, nor offer it as set-off. It is necessary that the defendant should own the claim, at the trial, which he wishes to set-off. Again, even if the check had been in possession of X or Y, at the trial, as the purchase of the check was conditional upon its usableness in set-off, it was not so absolutely the property of the defendant that he could use it as set-off. Again, since the deposit on which the check was drawn has since been paid in full, by the receiver of the bank, to allow its use as set-off would be requiring the bank to pay it twice.

MISTAKEN PAYMENT

If a check is drawn on a bank by one who has no funds in it, and the bank receives such check from the payee, on deposit, as cash, crediting the payee with that amount in his bank book, the bank not then cognizant of the fact that the drawer has no funds, the bank may, on becoming aware of that fact, the next day charge back the amount of the checks. It is a fraud, says Strong, J., to draw a check on a bank in which the drawer has no funds. "It amounts to a false affirmation that the money is there to meet it. Hence it is a deceit practiced upon any person to whom the check may be negotiated, and equally upon the bank upon which it may be drawn. It is manifestly impossible for the officers of a bank to keep ever in memory the state of each depositor's account. To a certain extent, confidence is reposed in the depositor that he will not present for payment a

[27]German Nat: Bank v. Farmers Nat. Bank, 118 Pa. 294.

[28]First Nat. Bank v. Shoemaker, 117 Pa. 94; Harrisburg Nat. Bank's Appeal, 10 W. N. 41; Saylor v. Bushong, 100 Pa. 23; Northumberland Bank v. McMichael, 106 Pa. 460.

[29]3 Kulp, 307.

check which he has not provided funds to meet, and the abuse of that confidence is dishonest. It is not easy to see how it is less dishonest in the holder of a check drawn by another, to present it for payment, when he knows the drawer has no funds in bank to meet it. His knowledge makes him a party to the fraud of the drawer, and he becomes a willing assistant therein."[30]

BANK BECOMES LIABLE TO HOLDER.

The 137th section of the Act of May 16, 1901, P. L. 212, concerning negotiable instruments enacts that "where a drawee to whom a bill is delivered for acceptance, destroys the same, or refuses within 24 hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted, to the holder, he will be deemed to have accepted the same." "Refuse" is not to be understood literally. Mere omission to return is a refusal. Bill, in this paragraph, includes check. Hence, if a check drawn on the X bank is sent to it, and it does not return it to the holder, or his agent, until more than 24 hours, e. g., until more than 2 days have elapsed, the bank will be liable to the holder for the amount of the check, as it would be, had it accepted the check; even though it may have intended not to pay the check, because of the want of funds of the drawer, and though, on the day of receiving the check, it handed it to a notary public for the purpose of protest.[31]

[30]Peterson v. Union Nat. Bank, 52 Pa. 206. The knowledge of the payee of the check was treated as important. But, surely under the circumstances of the case, the bank would have had the same right to charge back the check, even had the payee had no knowledge of the absence of funds. The check was for $9003. There may have been a deposit of $657.37 to the credit of the drawer.

[31] Wisner v. First Nat. Bank, 220 Pa. 21. The notary held the checks several days, without protesting them or giving notice of dishonor, when the agent of the payee of the check obtained it from him. Cf. also, Banking Co. v. First Nat. Bank, 37 Super. 17. In Northumberland Bank v. McMichael 106 Pa. 460, a check dated March 5th, upon the bank was received by it on March 6th, with a letter saying "Do not hold collections. Return promptly if not paid." The balance in favor of the drawer was then ample. On March 9th the bank received an order from the drawer of the check not to pay it. In a suit by the payee against the bank, whether the bank had not accepted the check prior to the countermand was referred to the jury, which found that it had accepted. The payee was therefore entitled to the money. The delay of the bank in actually paying, was accounted for, consistently with its having accepted, by the way it usually paid such checks, and by the fact that it was at the time, short of funds.

IMPLIED ACCEPTANCE.

The 123d section of the act of May 16th, 1901, states that the "acceptance must be in writing and signed by the drawee" and the 137th section provides that certain other acts shall be deemed equivalent to an acceptance. What the effect of this legislation upon the existence of other modes of acceptance is, does not yet appear by adjudications. A mode of acceptance, previously recognized was the following: If the drawee bank recognized the check, by deducting it from the account of the drawer, who acquiesced therein, it accepted the check. In Saylor v. Bushong[32] the drawer of a check payment of which had been declined by the bank, because it had suspended payment, settled with the bank, taking a note from it, for his balance. This balance was less by the amount of the check, than it otherwise would have been. From these facts a jury might properly have found an agreement by the bank to keep the money and pay the check to its holder. Says Trunkey, J., "Saylor (the holder) was holding the check and the defendants (the bank) knew it. In settlement of the drawer, at his request, they kept of his money the amount of the check for the purpose of its payment * * It matters not that the amount of the check was not formally charged against Yeich (the drawer) and credited to Saylor. If a bank pays a check on a forged endorsement, and deducts the check from the drawer's account and settles with him on that basis, it accepts the check, and must pay the money called for by it to the payee.[33] The correctness of this decision is however denied in Clark v. Savings Bank[34] on the authority of decisions of the Supreme Court of the United States. Though authority in Pennsylvania, until reversed, the court finds that since the act of May 10th 1881 has required acceptances to be in writing, constructive acceptances are no longer possible. The act of 1901 also requires acceptances to be in writing.

CONDITIONAL ACCEPTANCE.

There may be a conditional acceptance. Banks may agree that checks drawn on each other shall be paid, but that they may be returned by a certain hour, if it is discovered that there were

[32] 100 Pa. 23.

[33] Seventh Nat. Bank v. Cook, 73 Pa. 483. Charging checks to the drawer, said Rockfeller, P. J., in Northumberland Bank v. Mc. Michael, 106 Pa. 460, is evidence of acceptance.

[34] 31 Super. 647. Cf. Tibby Bros Co. v. F. & M. Bank, 220 Pa. 1.

no funds to meet them, or if payment has been stopped, etc. Under such a rule the placing of a check on file by the bank on which it is drawn and even entering it on the journal is not a final and conclusive payment. It becomes so, if the check is not returned by the specified hour.[35] The bank, when a check is presented, may decline then to pay, but promise that, if the check is left with it, and later deposits sufficient should be made by the drawer, it will pay the check. A course of delay of this sort might be shown between the plaintiff and the bank.[36]

ORAL ACCEPTANCE.

The act of May 10th, 1881, P. L. 17, forbade that any person should be charged as an acceptor of any bill of exchange, draft or order for money exceeding $20, "unless his acceptance shall be in writing signed by himself, or his lawful agents." Sued by the bank, the defendant undertook to set-off a check drawn on the bank by another, and held by defendant, on the ground that the bank had accepted it. The fact that the president of the bank orally promised to see it paid, if the holder would retain it for a few days, being an oral acceptance, imposed no duty on the bank.[37] In Maginn v. Dollar Savings Bank[38] McCartney had a deposit in the Savings Bank of $631. Being indebted, in a greater amount to Maginn he drew a check for $631 upon the bank. This check the bank refused to pay, on the ground that McCartney notified it not to pay. The plaintiff alleged (1) that the bank had accepted the check and (2) that the check worked an assignment and its acceptance was therefore unnecessary. The acceptance, if real, was oral, and therefore invalid. If the transaction was an assignment, says the court, (a) the suit should have been in the name of the assignor but (b) the more serious objection is the act of 1881, oblivious of the fact that if the transaction was an assignment, acceptance was unnecessary and the act of 1881 inapplicable. The 132d section of the act of May 16th, 1901, entitled "An act relating to negotiable instruments," enacts that "The acceptance [of a bill or check] must be in writing and signed by the drawee." This acceptance may be required

[35] German Nat. Bank v. Farmers Nat. Bank, 118 Pa. 294.

[36] Johnston v. Parker Savings Bank, 101 Pa. 597. The check was put in the bank in 1876, prior to the act of 1881 requiring written acceptances.

[37] National State Bank of Camden v. Lindeman, 161 Pa. 199.

[38] 131 Pa. 362.

by the holder to be put on the check or bill. If, however, it is written on a different paper from the check or bill, and is assented to by the holder, it binds the acceptor only in favor of the person who subsequently and in reliance upon it receives the check or bill.

PROMISE TO ACCEPT.

The 135 section of the act of May 16, 1901, declares that "An unconditional promise in writing to accept a bill, before it is drawn, is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." A telegraphic agreement to accept, is considered a promise in writing. A presents a check drawn by J. K. Lehman on the X bank, to the Y bank for $900. Before paying it, the Y bank telegraphed to the X bank "Will you pay check, J. K. Lehman $900." The cashier of the X bank replied by telegram "Will pay J. K. Lehman check $900." The Y bank then paid the check, and forwarded it for collection through the Z bank of Philadelphia. Meantime Lehman had notified the X bank not to pay the check, and it accordingly refused to pay it notwithstanding its telegram. The Y bank could nevertheless compel the X bank to pay the check.[39]

LIABILITY NOT ASSUMED.

A presents to the drawee bank a check. The drawer had not in the bank sufficient funds to pay it. Instead of protesting it on the day of its receipt, the bank tried to induce the drawer to deposit enough to meet the check. Failing in that the check was protested the following morning, and the bank that was notified forwarded it for payment, by telegraph, the following morning. The drawee bank was bound neither to induce the drawer to increase his deposit nor to notify its correspondent by telegraph of the dishonor. As no injury arose to the holder of the check (the payee) from failure to protest the check until the day after its presentment, that failure imposed no liability for the check upon the drawee.[40]

[39] Farmer's Bank v. Elizabethtown Bank, 30 Super. 271.

[40] Whitman v. First Nat. Bank, 35 Super. 125. If, when the check is presented, it is by an employe who has no authority to do so, charged to the account of the drawer, the act may be corrected later, by the cashier, as soon as he discovers it, by crediting the drawer's account with the amount of the check.

CERTIFICATION OF CHECKS.

The bank upon which a check is drawn may certify it. "Where a check" says the 187th section of the act relating to negotiable instruments[41] "is certified by the bank on which it is drawn, the certification is equivalent to an acceptance." No particular form is necessary to the certification. It may be effected by the bank officer writing the word "good" followed by his name, upon the face of the check[42] or by writing the words "good when properly endorsed," followed by the name of the officer.[43]

OFFICER WHO CERTIFIES.

The cashier has probably the power to certify checks when there are funds in the bank at the time to meet them, by virtue of his office.[44] An employe of the bank who is called Assistant Teller, may have the authority to certify.[45] That such Assistant Teller has the bank's authority to certify may be shown by the explicit conferring of the authority, or that he was in the practice of certifying with the knowledge and tacit consent of the bank [In this case an unincorporated company]. Apparently, the cashier may effectively authorize him, either to certify generally, or to certify some particular checks.[46] It may be shown by an officer of another bank, that from 1869 to 1873 he saw quite a number of checks which, certified by this person as assistant teller, had been duly honored by his bank.[47] It may be likewise shown that the holder of the check, after its certification, when he presented it for payment, exhibited it not only to the officers of the bank, but also to some of the directors who were present, and that they, not objecting to the certification, simply said it was then inconvenient for them to pay it. The president may, if he has authority of the bank, certify checks.[48]

BANK NOT IN FUNDS.

If the officer who certifies, has authority to certify when

[41] P. L. 1901; p. 194, 219.

[42] Girard Bank v. Bank of Penn Township, 39 Pa. 92; Hill v. Trust Co. 108 Pa. 1.

[43] Ackerman v. Dornan, 2 Leg. Rec. 345; Dorsey v. Abrams, 85 Pa. 299.

[44] Dorsey v. Abrams, 85 Pa. 299.

[45] Hill v. Trust Co., 108 Pa. 1.

[46] 108 Pa. 1.

[47] 108 Pa. 1; Dorsey v. Abrams, 85 Pa. 299.

[48] Ackerman v. Dorran, 2 Leg. Rec. 345.

there are funds of the drawer in the bank, his certification will bind the bank, towards a *bona fide* holder, for value of the check after such certification. "If his authority" says Sterrett, J., "as between himself and principals, was in fact restricted to cases in which the drawer had sufficient funds and he either intentionally or by mistake, transcended that authority, by marking the check "good" when the drawer thereof had no funds, the consequences of his infidelity or blunder should be visited not upon the innocent holders of the checks so certified, but upon the agent's employers who put it in his power to commit the wrong."[49]

CHECK NOT DRAWN IN USUAL COURSE OF BUSINESS.

When the check is drawn, not to secure the early and unconditional payment by the bank of the money called for by it, but to be held as collateral security for the doing of some act, and to secure the payment of money to the holder only on the contingent failure of performance of this act, the cashier has no authority to certify it, and if the object of the check appears on its face, the want of authority can be set up by the bank against any subsequent purchaser of the check. A check required the Citizens' Savings Bank to pay to D or order $2,000. Then followed the words "To hold as collateral for 1,000 P. T. oil, pipage paid to January 4, 1876." There were no funds in the bank at the time with which to meet the check. Says Paxson, J., "It is also apparent that the check was entirely out of the usual course of banking business * * Instead of being a mere order upon a bank to pay a certain sum of money to a person therein designated or to bearer it has the significant endorsement in one corner, "to hold as collateral," etc.. This indicates plainly that the check was given merely as collateral security for the delivery of the oil." There was also evidence that the check was given as security for the return of borrowed oil. If the oil was not returned, the check was to be paid. "If" says Paxson J., "the certificate of Foster [the cashier] that the check was "good when properly endorsed," is to bind the bank, then the cashier has made the bank security for the delivery of 2,000 barrels of oil. This he could not do without authority. * * There is not a word in the evidence to show that the defendants [a banking firm] or any of

[49]108 Pa. 1.

them knew of this transaction, much less sanctioned it.[50] The holder of such a check, knowing that he could withdraw the money, only after default in the delivery of the oil, could not enforce it against the bank, even after such default.

WHO MAY CAUSE THE CERTIFICATION.

The application to the bank to certify the check, may be made by the drawer, in order to increase the readiness of the payee to receive it, or by the payee or later holder, after it has been received from the drawer, "Where" says section 188 of the act relating to negotiable instruments[51] "the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon." The certification of a check is often to be regarded as a payment by which the drawer is discharged. "This is so where the certification is procured by the holder after the check has been delivered. On the other hand, the drawer will not be discharged by certificate procured by himself."[52]

EFFECT OF CERTIFICATION ON THE BANK.

When the bank, at whosesoever instance, certifies a check it becomes unconditionally bound to pay it. Even if the depositor has no funds at the time, or afterwards, in the bank, it must pay the check to a *bona fide* purchaser.[53] If he has funds the sum mentioned in the check ceases to stand to his credit. It forthwith passes to the credit of the holder of the check.[54] The bank, therefore, which is not ordinarily suable on a check by the holder, may be sued by him upon it, if it has been certified.[55] But, after certification, as before, the bank is not suable until a demand for payment has been made upon it, and the statute of

[50] Dorsey v. Abrams, 85 Pa. 299, An unsuccessful attempt was made to show the recognition by the bank of the cashier's certifications in prior similar cases. The cases proved were of certifications of "straight checks" that is, checks for the payment of money free from clog or condition.

[51] P. L. 1901, p. 195; 219.

[52] 7 Cyc. 644. The endorsee of the check procured the certification in Hill v. Trust Co., 108 Pa. 1.

[53] Hill v. Trust Co. 108 Pa. 1.

[54] Girard Bank v. Bank of Penn Township, 39 Pa. 92; Trust Etc. Co. v. White, 206 Pa, 613.

[55] 39 Pa. 92; 108 Pa. 1; 85 Pa. 299.

limitations begins to run only from such demand.[56] Apparently the certifying bank is not liable even to a *bona fide* purchaser of the check, for value if, prior to the certification, the check has been "raised," and it was not negligent in certifying.[57]

WHEN CERTIFICATION INEFFECTUAL.

The check may have been procured by fraud or undue influence from the drawer. He may have been, when he drew it, *non compos mentos*. Under such facts, the bank, although it has certified the check, may be compelled not to pay the money to the holder, if he is not one, against whom, in a suit upon the check itself, the drawer could not successfully set up such a defense. In Trust & Safe Deposit Co. v. White,[58] White drew a check upon the Lancaster Trust Company for $1,500, in favor of a son. This check was certified by the Trust Co. Shortly after White's death the son presented the certified check to the X company and received a cashier's check for it. Meantime, other sons of White notified the Lancaster Trust Co., not to pay the check, and that company accordingly refused to pay it when it was presented. Subsequently the X company sued the Lancaster Trust Company to recover the amount of the check. That company paid the amount into court, and an issue was formed between the X company and the administrators of White, to test the validity of the check, on the ground of alleged mental incapacity of White. The court finding no adequate evidence of White's insanity, properly gave binding instruction for the X company. It was entitled to the money as holder of the certified check, having given its cashier's check for it.

SUIT AGAINST DRAWER OF CERTIFIED CHECK.

It is said by Walker, J., that the extent to which the drawer of a check is liable upon it after he has had it marked good, depends upon the agreement and understanding of the parttes. The holder continues bound to present the check within due time, to the bank, and if he does not, and the bank suspends payment,

[56] 39 Pa. 92. Payment of the money to the original depositor, two years after the certification, is no excuse for not paying it, five years later to the holder. Thus paying the deposit and taking from the depositor a bond of indemnity, would rebut the presumption of payment of the check, if there were any.

[57] 136 Pa. 426.

[58] 206 Pa. 611.

the drawer of the check will be discharged. Whether more than a due time elapsed, when eight days elapsed, since the issue of the certified check before the holder presented it for payment, the bank having meanwhile suspended, the jury, not the court, must determine.[59]

ENDORSEMENT OF CHECK.

A check, like other negotiable paper, may be endorsed by the payee, and thus negotiated.[60] The fact of an endorsement on the check prior to the payee's name, is immaterial. It cannot prevent his recovery.[61] A check, payable to a partnership may, in its name, be endorsed by one of them.[62] An endorsement of one who is insolvent, to a relative without consideration, will be invalid, as against the creditors of the endorser, who may attach the money, as still his property. But, if this gratuitous endorsee in turn, endorses to another who pays value, and has no notice of the fraud, the last endorsee will be entitled to the money.[63] The endorsee for a good consideration having no notice of fraudulent representations by which the drawer was induced to draw the check to the payee had a right to obtain the money on the check, and obtaining it, to retain it as against the drawer.[64]

VIRTUAL TRANSFER OF CHECK.

A sells corn to B intending the sale to be for cash, and receives B's check. B fails later in the day, before presentment of the check for payment. Meantime, B has sold the corn to C. receiving C's check. B deposits this check in his bank which has heretofore honored his checks in excess of his deposits, under what was virtually an agreement so to do. This makes the bank the account in which of B had been overdrawn a holder for values of the check. A will not be entitled to a decree in equity that the bank transfer this check to A, on the theory that the sale of the corn could be rescinded by A, and that therefore, when C. received the corn, the check given by him, became A's.[65]

[59] Ackermann v. Dorman, 2 Leg. Rec. 345. The bank suspended payment on the seventh day following that on which the check was issued. The check was not presented until the next day. On the day after the check had been certified, the account of the drawer had been charged with its amount. At the time of the giving of the check and up to the time of the suspension, the drawer had had on deposit very much more than the amount called for in the check.

[60] Walker v. Geisse, 4 Wh. 252.

[61] Woodward v. Clung; 1 Phila. 176. The payee's possession of the check, after he had endorsed it to others, is evidence that he has taken it up.

[62] Fulweiler v. Hughes, 17 Pa. 440.

[63] 17 Pa. 440. Notice of the prior gift is not notice of the fraud. There must be notice of the insolvency.

[64] Stedman v. Carstairs, 97 Pa. 234.

MOOT COURT

GEORGE HAYNES V. KATE BAKER.

Set-Off—Appeal from Justice of the Peace—Motion for Non-Suit

STATEMENT OF FACTS.

In November, 1888, George Haynes brought suit against Kate Baker *in assumpsit* for $60, alleged to be due him for team work. At the trial before the justice, Baker showed set-off to the amount of $200, and judgment was rendered in favor of the defendant for $140. An appeal was taken by the plaintiff and the transcript filed as of No. 5, February term, 1889. Nothing was done until July, 1909, when the case was set down for trial by the defendant. Motion on the part of the plaintiff, Haynes, for leave to take a voluntary non-suit. Rule to show cause.

STRAUSS for Plaintiff.
BARNITZ for Defendant.

OPINION OF THE COURT.

BARRETT, J.—To confer jurisdiction on the Common Pleas Court in a case appealed from the court of a justice of the peace, it must be shown that the latter had jurisdiction of the cause. The justice of the peace in this case had jurisdiction conferred on him by the Act of Assembly of July 7, 1879, Section 1, P. L. 194, which reads: "The aldermen, magistrates and justices of the peace in this commonwealth shall have concurrent jurisdiction with the Courts of Common Pleas of all actions arising from contract, either expressed or implied, and of all actions of trespass and of trover and conversion wherein the sum demanded does not exceed three hundred dollars, except in cases of real contracts where the title to lands or tenements may come in question, or action upon promise of marriage."

We shall now proceed to consider the effect of a voluntary non-suit and summon to our aid the case of Township of Moreland v. Gardner, 109 Pa. 118, which contains the following discussion: "Practically the cause was as effectively terminated by the plaintiff therein suffering a non-suit. It ended the case. The effect is not the same as if the party appealing had withdrawn his appeal. If this had been the case, the effect would have been to reinstate the judgment." In this connection we shall also consider the case of McKennan v. Henderson, 5 W. & S. 370, in which the court held that "if a cause be referred to arbitration and an award made in favor of the defendant for a certain sum and the plaintiff appeals, and afterward, by leave of the court, suffers a non-suit, the award is thereby defeated. The non-suit has the same operation as at common law, and, at common law, it cannot be pretended but that the proceedings must be *de novo*." The latter case is affirmed in 95 Pa. 203.

No authority has been found in this state to support the proposition that a non-suit can be granted where judgment is given, after a set-off

has been pleaded. It is true, however, that the court in McCredy v. Frey, 7 Watts 496, in which case a set-off was pleaded, granted a voluntary non-suit, but the non-suit was allowed before judgment was given, and after the evidence had all been heard on both sides. There, the court was particular to emphasize that the plaintiff may suffer a non-suit at any time during the trial of the cause and before the jury are ready to give their verdict, notwithstanding that there be an issue upon the plea of set-off. And the court will refuse a non-suit where the application is made after the jury have agreed upon and sealed their verdict, but before they have formally announced their verdict in court.—5 Pa. C. C. 151.

The court in the latter case distinguishes 8 Watts 308, 7 Watts 496, and 9 W. & S. 153, declaring that, in the cases distinguished, the question turned on, when are the jury ready to give their verdict? In 5 Pa. C. C. 151, the court construes the Act of March 28, 1814, which is as follows: "Whenever on the trial of any cause, the jury shall be ready to give their verdict, the plaintiff shall not be called, nor shall he then be permitted to suffer a non-suit." In discussing the act that court says: "This act was remedial and ought to be so construed as to remedy the wrong it was intended to remedy, that is, to prevent the plaintiff from being non-suited after the verdict was agreed upon."

To further guard against any wrong from this source, the Legislature passed the Act of April 16, 1903, Section 1, P. L. 216, which is now upon our statute books. The act is as follows: "Hereafter, upon the trial of any cause in any court of common pleas of the Commonwealth, the plaintiff shall not be permitted to suffer a voluntary non-suit after the jury have agreed upon their verdict, sealed the same and separated, unless such non-suit shall be especially allowed for cause shown." Applicable to the case at bar in the following doctrine, which we find in 1 Rawle 341: "Non-suit will not be allowed when by so doing the plaintiff will obtain an advantage and the defendant will be prejudiced or oppressed." We decide the case before us upon the latter anthority.

Rule discharged.

OPINION OF SUPERIOR COURT.

In Lewis v. Culbertson, 11 S. & R. 60, Duncan, J., said: "As I understand the law on this subject, it is that the plea of set-off is in its nature an action and that the plaintiff cannot discontinue." The great weight of authority outside of Pennsylvania is to the same effect.—14 Cyc. 407. In Pennsylvania, however, the contrary doctrine is held to be the law. In McCredy v. Fey, 7 Watts 496, the remark of Duncan was held to be mere dictum and it was held that the plaintiff may suffer a non-suit at any time before the jury are ready to give their verdict, notwithstanding the fact that there is an issue upon a plea of set-off. The plaintiff is entitled to suffer a non-suit after the defendant has pleaded a set-off, even though issue has been joined on the plea and evidence has been given in support thereof.—Gilmore v. Reed, 76 Pa. 462, McCredy v. Fey, 7 Watts, 496. The fact that the set-off exceeds the plaintiff's claim does not deprive the plaintiff of his right to suffer a non-suit.—Shannon v. Truefet, 1 W. N. C. 248.

It has also been held that when the plaintiff has recovered a judg-

ment before a justice and the defendant has appealed, ipi the tffmlnaay suffer a non-suit in the common pleas, and that the effect of the non-suit is not only to put the case out of the common pleas but to leave no judgment before the justice. "Practically the cause was effectively terminated by the plaintiff therein suffering a non-suit. It ended the case. The effect was not the same as if the party appealing had withdrawn his appeal. If this had been the case the effect would have been to reinstate the judgment. In this case the defendant in the judgment appealed therefrom. During the pendency of that appeal the judgment was superseded. The case was an action pending. Thereupon, the plaintiff, by suffering a non-suit, not only put the case out of the common pleas, but left no judgment before the justice."—Moreland v. Gardner, 109 Pa. 116.

No case, however, has been found holding that where the defendant has recovered judgment before a justice on a plea of set-off and the plaintiff has appealed therefrom, the plaintiff may suffer a non-suit and thereby "have no judgment before the justice."

It is true that it has been held that if a cause has been referred to arbitrators under the compulsory arbitration law and an appeal taken by the plaintiff, and afterwards, by leave of court, the plaintiff has suffered a non-suit, the award is thereby defeated.—M'Kennan v. Henderson, 5 W. & S. 370; Dubois v. Bigler, 25 Pa. 203. These decisions, however, were the result of a section of the statute regulating compulsory arbitration, which provided that "the court may, after appeal, allow the plaintiff to suffer a non-suit, with like effect as if the case had not been referred as aforesaid," etc.—Section 25, Act of 1836, P. L. 722. Prior to the enactment of this statute, it was held that if a plaintiff, after having entered an appeal from an award of arbitrators, suffer a voluntary non-suit, the award became an absolute judgment.—King v. Sloan, 1 S. & R. 77; Hostetter v. Kaufman, 11 S. & R. 148. The decision in these cases to the effect that the award became absolute was based upon the 10th section of the Act of March 20, 1810, which provided that "the award of arbitrators shall have the effect of a judgment *until reversed on appeal.*"

The statute providing for appeals to the common pleas from the justice of the peace does not so provide. The appeal acts as a *supersedeas* and the judgment rendered by the justice of the peace is not regarded as in being, or having any virtue attached to it whatever after the appeal shall be duly taken out and entered.—Hastings v. Lalough, 7 Watts 540. It seems, however, that the mere taking of an appeal does not annul the judgment before the justice under all circumstances. For it is held that whenever there is a judgment before the justice on the merits, against the plaintiff, from which he appeals to the common pleas and discontinues, that judgment is a bar to any other suit for the same cause of action. —Rose v. Turnpike Co., 3 Watts 46; Teton v. Weyman, 10 Pa. 70. See, also, Mooreland v. Gardner, supra. The difference in the legal effect of a non-suit and a discontinuance is slight.—Evans v. Clover, 1 Grant 164.

But whether the effect of permitting a non-suit in this case would be to make the judgment in favor of the defendant absolute or to annul the whole proceeding and place the parties in the same position as they were before the action was started, the opinion of the lower court must be affirmed.

If permitting the non-suit would have rendered the judgment for the defendant absolute, surely the plaintiff has no reason to complain because it was not permitted.

On the other hand, if the effect of permitting the non-suit would have been to annul the whole proceeding, the learned court was right in refusing to permit the non-suit. A non-suit will not be permitted if the plaintiff will thereby gain an advantage and the defendant will be prejudiced or oppressed, or deprived of any just defense.—14 Cyc. 406; Bank v. Fisher, 1 Rawle 341; Payne v. Grant, 7 W. N. C. 406.

The present case is one in which this rule should be applied. The case was tried before a justice and the defendant obtained a judgment. From this judgment the plaintiff appealed, and after the case was set for trial he moved for leave to take a voluntary non-suit. Under the hypothesis that the effect of a lowing this non-suit would be to annul the whole proceeding, its consequence would be that the defendant would lose the benefit of his judgment which may be his only security for money justly due, and, further, when he commenced a suit against the plaintiff he would probably be met by a plea of the act of limitations.

There is not the slightest necessity for allowing the non-suit. The only reason that can be alleged is that the plaintiff might be forced to trial in the absence of his witnesses or without other means of proof. It is a curious remedy by which the injury, if there is one, is shifted from the one and thrown upon the shoulders of the other. To relieve the plaintiff from a difficulty caused very probably by his own negligence, it would be necessary to do a positive wrong to the defendant. Moreover, the court has ample power to protect the plaintiff by allowing a continuance.

Judgment affirmed.

COMMONWEALTH V. COAL.

Receiving Stolen Goods—Act of April 23 1909, P. L. 159. Liability of Ultimate of Several Vendees.

STATEMENT OF FACTS.

Hadley took and carried away the goods of Johnson under such circumstances as to constitute larceny. Beyer bought the goods from Hadley, knowing that they had been stolen. Coal bought the goods from Beyer knowing that they had been stolen.

MENDELSOHN for Commonwealth.

CHALLIS for Defendant.

OPINION OF THE COURT.

BRANYAN, J.—The question in this case treats not of a mere receiver of stolen goods, but is whether or not a person who receives the goods, knowing them to have been stolen, from a previous receiver, is guilty of receiving stolen goods. This question depends upon whether or not this second receiver comes within the statute of 1909, P. L. 159, which reads as follows: "That if any person shall buy, have or receive,

within the limits of the Commonwealth of Pennsylvania, any goods, chattels, moneys, or securities, or any other matter or thing which shall have been stolen or feloniously taken, either in the Commonwealth of Pennsylvania, or in any other state or country, knowing the same to have been stolen, or feloniously taken, such person shall be guilty of a felony, and on conviction, suffer the like pains and penalties which are by law imposed upon the person who shall have actually stolen or feloniously carried away the same within the limits of this commonwealth."

It is true, as counsel for defendant has said and cited, that the "receiver of stolen goods was anciently guilty of only a misprision of felony or of a compounding of felony. But later he became an accessory after the fact to the thief under an old English Statute. Later legislation in England and the United States has made this offence a substantive crime. —Bisp. Cr. Law This is also substantiated by Dr. Trickett in Trickett's Penna. Cr. Law 37.

But in all the cases cited in Beale's Cr. Cases 775, 777 and 778 by defendant, and 36 Mo., 394, 41 Ala. 393, and 95 N. C. 626, the old English doctrine of a first receiver is illustrated and hence is not in point with the case at bar.

At common law these doctrines applied: (a) receiving goods from one who guiltily received them from the thief has been held not to be receiving stolen goods, as in the receiver's hands the goods are not stolen. Clark's Cr. Law, P. 328, 36 Ire. 338. 2 Bisp. New Cr. Law § 1140. (b) The receiver of stolen goods must have received them from some person who is guilty of larceny as principal offender, State vs Ives, 13 Ire. 338, because in the latter case, they are not, as to the person who gets them property stolen. Cassel vs State, 4 Yerg. 149. Wright vs State 5 Yerg. 154.

Now legislation in Pennsylvania previous to this Act of 1909, is the Act of Mar. 31, 1860, p. 382, P. & L. Dig., "If any person shall buy or receive any goods, chattels, moneys, securities or any other matter or thing, the stealing of which is made larceny, by any law of this commonwealth, knowing the same to have been stolen, or feloniously taken, such person shall be guilty of a felony, and on conviction etc."

"The only possible defense in this case would be that defendant was so intoxicated as not to have the intent to carry out the particular crime or that the defendant was a married woman and did the act under the coercion of her husband "Trickett's Cr. Law, Vol. I.

This act of 1909, the court holds is simply declaratory of the act of 1860, and has been made to be a little larger in its scope than the act of 1860. But the court also holds that this statute's purpose is to fill in the gap, which is left in the common law, by not including the second receiver.

We hold, that it would be a great injustice, should the statute not cover the case at bar, for the law would find no little trouble tracing the goods from one receiver to another.

The defendant is indicted under the Act of 1909, and since the elements of knowing the goods to be stolen, and the fact that they were stolen, are present, the court declines to give the instruction asked for.

OPINION OF SUPERIOR COURT.

The crime defined by the Act of April 23, 1909, T. L. 159, consists of buying having or receiving, in this State, of goods etc, which shall have been stolen anywhere, with knowledge that they have been stolen.

The goods in the case before us were Johnson's. They were stolen from him by Hadley. Beyer bought them from Hadley, knowing that they had been stolen. Coal bought them from Beyer, with the same knowledge.

The goods did not cease to have been stolen, and to be stolen goods, when Beyer bought them; they remained such when Coal took them from Beyer. It has been mysteriously said, in Foster v. State 106 Ind. 272, that "If therefore the goods have been transferred from the thief to a guilty receiver the latter takes as a receiver and not as a thief. [Who could doubt it?] In his hands and as to him the goods are not stolen. [!!] In his hands the character of the goods is derived from his offense, and not from the offense of the person who stole them *so that* one who receives such goods from him, however wickedly, is not guilty of receiving stolen goods within either the common law or statutory definition of the offense, unless such second or subsequent receiver receives the goods under circumstances which connect him with the thief." Stolen goods are goods, we suppose, that have been stolen, from the point of view of the owner who has been deprived of them, and are still his, although they are still in the possession of the thief or of some other person without any authority from the owner, obtained since the theft. A doctrine similar to that of Foster v. State, is set forth by Wharton, 1 Crim. L. p. 855; by Bishop, 2 Crim. Law, p. 643, and by 24 Am. and Eng. Encyc. p. 50.

On the other hand, Tindal C. J. in Rex v. Jervis 6 C. & P. 156 said that it was unnecessary that the indictment should name the persons who committed the theft, or should aver that he was unknown, because "the offense created by the act of parliament is not receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question therefore will be whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen."

That it is not necessary that the goods should have been received from the thief, is the doctrine of Levi v. State, 13 Neb. 1 (14 N. W. 543). of Smith v. State, 59 Oh. St. 350; 52 N. E. 826; and of State v. Fink, 186 Mo. 50; 84 S. W. 921. Cf. also, 34 Cyc. 518.

The policy of the act of 1909 like that of its predecessor is evidently to diminish the temptation to theft and to facilitate the recovery of the goods by embarrassing the disposal of the stolen goods, and this policy would dictate the incriminating of the knowing receiving not less from a receiver than from the thief himself. To embarrass the receiver's disposal of the goods is to lessen his willingness to take them, and thus to lessen the willingness of the thief to steal them.

The writer of the opinion in State vs. Fink, 186 Mo. 50 observes: "An examination of the case demonstrates that finally the terms of the statute or law in force defining the offense, must control and furnish the solution of the proposition. Under the provisions of our statute the only element of the offense is the receiving of stolen property with knowledge

at the time of its reception, that the same was stolen. There is an entire absence from the terms of our statute of any indication that the person from whom the stolen property is received is to constitute an essential element of the offence." A similar remark can be made of the act of 1909. It would have been easy for the legislature to say that any person who should buy etc. any goods, etc. which should have been stolen, *from the thief*, should be guilty of a felony. It has not used the words *from the thief* or any equivalent. We should mar the act, and lessen its efficiency, if, usurping the functions of the legislature, we should intercalate these words.

Judgment affirmed.

BOWMAN V. WEINER.

Trespass for False Imprisonment—Assisting Officer to Arrest.—When Justified.

STATEMENT OF FACTS.

A man was found dead on the street of Carlisle and the surrounding circumstances suggested that a murder had been committed. One Mitchell, a policeman, at once suspected Bowman, a man whom for several reasons, Mitchell was anxious to have in prison. In fact the dead man died from natural causes and Mitchell had not reasonable grounds for suspecting Bowman, had a crime been committed. Mitchell did not get a warrant for Bowman's arrest but started at once for his house. Meeting Weiner in front of Bowman's house he called on him to accompany him and aid in the arrest of Bowman. Weiner demurred, asked about the cause, warrant, etc., but Mitchell replied that there was no time for discussion and that if he failed to help, he would do so at his peril. Weiner then aided Mitchell in arresting Bowman and taking him to jail. Bowman now brings this action for false imprisonment against Weiner.

EASTER for Plaintiff.

SILVERMAN for Defendant.

OPINION OF THE COURT.

MOYER, J.—The facts in this case expressly state that Mitchell, the policeman, had "no reasonable grounds for suspecting Bowman, had a crime been committed." Consequently, the officer could be held in an action for false imprisonment. In the case of a felony an officer can only arrest without a warrant where the felony has been committed or where he has reasonable grounds of belief that it has been recently committed and that the person whom he arrests is the offender. But even then, if he has time, he should go to a magistrate and get a warrant. Burk v. Howles, 179 Pa. 539. Had Weiner, the private citizen made the arrest himself without the intervention of the policeman, he would certainly be in no better position than the officer. A constable or other officer may justify an arrest for reasonable cause of suspicion alone; and in this respect he stands on more favorable ground than a private person,

who must show, in addition to such cause, that a felony was actually committed.—Russel v. Shuster, W. & S. 308.

So the question now arises, whether Weiner is protected in this action for false imprisonment because of the fact that he acted only upon the order of the officer and obeyed stricty that order. "There are circumstances in which public officers are authorized to require private citizens to assist them in performing official duties; and if, being called to render this assistance, they without lawful excuse, refuse, or having undertaken, refuse to proceed in good faith,—they must answer for the refusal as a crime." Bishop's Criminal Law Vol. 1 sect. 920. Comfort et al. v. Com., 5 Wharton, page 440, sets out that by the Act of 1772 section 6, protection is afforded to any constable or officer, or any person or persons acting by his or their order and in his aid, for anything in obedience to *any warrant* under the hand and seal of any justice of the peace; which applies generally to civil as well as criminal cases. But this clearly specifies protection under a warrant and there was no warrant in the present case.

We find that in Firestone v. Rice, 71 Mich. 377, it has been held that a person who, when called upon, comes to the assistance of one whom he knows to be an officer, if in his acts he confines himself to the orders and directions of the officer, is protected against suits for trespass and false imprisonment, whether the officer was acting legally or not. This doctrine has also been held to in one or two other cases. However, in view of several other decisions and the discussion of the subject in the digests, we believe that this doctrine is not a correct statement of the law. In Am. and Eng. Enc. Vol. 12 page 770, it is stated that "the true rule is believed to be that a person assisting an officer at his request, simply stand upon the same ground as the officer himself and is subject to the same liability." And in Volume 19 Ency. page 350, d: "a person who assists an officer in the performance of his legal duty, although without process, is justified at least, whenever the officer would be justified. But if the justification of the arrest itself fails, the officer and those who aid, or abet him may also be liable. Justification exists only in respect of a known peace officer, authorized to arrest."

Persons assisting an officer at his request, in making an arrest, are liable in false imprisonment, if the warrant attempted to be executed is a void warrant.—Nidoy v. Stephens 3 Blackf, (Ind.) 48. In Vinton v. Weaver, 41 Me. 430, the court said: "It is insisted that a distinction exists between the aids and servants of the officer and the officer himself, and that, while it is conceded that the latter may be liable, the former should be exempt from liability. But such seems not to be regarded as the law. They must both stand or fall together" and again in the case of Oystead v. Shed, 12 Mass. 506, it was held that a distinction is made between cases where the act of the officer was originally unlawful and those where he is subsequently guilty of conduct which renders him a trespasser ab initio. In the first instance private persons aiding or assisting an officer are liable as joint trespassers with the officer, but in the latter they are exempt.

There are no particular circumstances stated in the case at bar to take it out of the above stated rule. The arrest by Mitchell was an un-

lawful one. He had no warrant and there were no reasonable grounds for suspecting Bowman. Weiner asked the policeman about the cause, warrant, etc., and was refused information. This should have put him on his guard. Weiner was bound to know Mitchell's authority. The act of Mitchell being unlawful, Weiner was a joint trespasser. The situation was an unfortunate one for Weiner, but he might have redress against Mitchell. Judgment is entered accordingly for the plaintiff.

OPINION OF SUPERIOR COURT.

It is not necessary, in all cases that an arrest for an infraction of the criminal law should be under the authority and by command of a warrant. A private citizen, as well as an officer of the law, may under certain conditions arrest without a warrant even in cases of felony. The rights of a private citizen and an officer to arrest without a warrant in cases of felony are not however, the same. This distinction is this: An officer may arrest without a warrant upon probable cause though no felony has been actually committed; but a private citizen may arrest without a warrant only when (1) the felony charged has actually been committed, and (2) there is probable cause for supposing the party arrested to be guilty. —Russell v. Shuster 8 W. & S. 308; Wakely v. Hart 6 Binn, 317; Brooks v. Corn 61 Pa. 352.

The arrest by Mitchell was unlawful because not based upon "probable cause" and an arrest by Weiner, acting independently of the policeman, would have been unlawful because no felony had actually been committed.

The sole question, therefore is as to the effect of Mitchell's command to Weiner to aid him in making the arrest. There is a decided conflict of authority upon the question whether one who, in response to a call for his services by a police officer, assists the latter in making an arrest, may justify where the arrest itself is illegal, and the officer himself cannot justify.

The majority of the cases hold that one called upon to assist an officer must decide at his peril whether or not the officer is justified in making the arrest and cannot justify unless the officer can justify. Mitchell v. State, 12 Ark. 50; Pow v. Beckner, 3 Md. 475; Batchelder v. Currier, 45 N. H. 460; Vinton v. Weaver, 41 Me. 430, Barnette v. Hicks, 6 Tex. 852; Oystead v. Shed, 12 Mass. 506; Elder v. Morrison, 10 Wend. 128.

The tort of false imprisonment is regarded as a breach of an absolute duty, and the holding of these cases is in conformity to the general principle that the command of another is no defence to an action for tort.

The decision of the learned court below is amply justified by the authorities cited.

Judgment affirmed.

TAYLOR V. RICE

Bulk Act of March 28, 1905—Fraudulent Sale—Notice to Vendee

STATEMENT OF FACTS.

Rice, a wholesale dealer, sold a quantity of groceries to Berger, on thirty days credit. Ten days after he received the goods Berger sold his

entire stock and fixtures to Taylor who paid cash and took possession at once. Taylor asked Berger whether he had any creditors and Berger named one Scott whom he said he would pay at once. He did not give Taylor Scott's name and address in writing and he did not mention his debt to Rice. As soon as the thirty days credit expired and Berger failed to pay, Rice brought suit against Berger and notified Taylor he would levy on the stock Taylor had bought as soon as he got judgment. He did not get judgment until four months after Taylor's purchase but he at once levied on the stock of goods in Taylor's possession. Taylor brings trespass.

COHEN for Plaintiff.
DAY for Defendant.

OPINION OF THE COURT.

EASTER, J.—The facts set forth in the plaintiff's statement involve and are governed by an Act of Assembly of March 28, 1905 P. L. 62, commonly known as the Bulk Act; that is "Relative to the sale in bulk of the whole, or a large part of a stock of merchandise, and fixtures, or merchandise, or fixtures, not in the ordinary course of business; providing certain requirements thereof; imposing certain duties upon the seller; and making their violation a misdemeanor."

The manifest object of this legislation is to prevent, or at least to render more difficult and improbable the successful perpetration of the kind of fraud named in the act and the means chosen by the legislature have a real and substantial relation to that object.

Section 1 of the Act enacts, "That the sale in bulk of the whole, or a large part, of a stock of merchandise and fixtures, or merchandise, or fixtures, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business shall be deemed fraudulent, and voidable as against the creditors of the seller, unless the purchaser shall in good faith, and for the purpose of giving the notice herein required, make inquiry of the seller, and receive from him a list in writing of the names, and places of residence or business of each and all of his creditors, and, unless the purchaser shall, at least five days before the consummation of the sale, give personal notice of said proposed sale, to each of the creditors of the seller as appearing on said list. or use reasonable diligence to cause personal notice to be given to him, or shall deposit in the mail a registered letter of notice, postage prepaid, addressed to each of the seller's said creditors at his postoffice address, according to the written information furnished; provided, however, that no proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale, after the expiration of ninety days from the consummation thereof."

It was certainly not enacted for the mere purpose of oppressing any class of persons, but was designed rather to promote with as little individual inconvenience as possible, the general good. Compliance therewith in good faith tends not only to the protection of creditors but to the security of the purchaser in his title as well. Wilson v. Edwards, 32 Pa. Sup. Ct. 311.

Many restraints upon the freedom of contract have been sustained as

valid. Examples are; the statute of frauds, the act to prevent fraudulent conveyances, insolvent laws, the recording act, the prohibition of usury, and others. These show in how many ways and in what varied forms the legislature may properly restrain freedom of action in commercial transactions in order to promote the general welfare. While commerce is hampered to a limited extent in some ways, it is protected and promoted to a much greater extent in other ways.

The act has been held constitutional in Wilson v. Edwards, 32 Pa. Sup. Ct. 285; and not to be arbitrary class legislation 39 Sup. Ct. 39.

The statute deals with a particular class of sales but the rule of conduct prescribed for the seller in each sale within the class is precisely the same as that prescribed for the seller in every other sale within the class, and the same is true of the purchaser. It is true the effect of the legislation is to require the parties to such sale to do that which parties to other sales of personalty are not required to do, and in that sense it is class legislation with respect to persons as well as to things.

The facts disclose in the case that Taylor did not comply with the requirements of the act. He did not in good faith and for the purpose of giving the notice required, make inquiry of the seller, and receive from him a list of the names and places of residence or business of each and all of Berger's creditors, and; "unless the purchaser shall, at least five days before the consummation of the sale, give personal notice of said proposed sale, to each of the creditors of the seller, as appearing on the said list, or use reasonable diligence to cause personal notice to be given them," the sale is void. Notwithstanding this negligence of Taylor the fraudulent intent by Berger in making the sale renders the sale invalid and voidable. This case is governed in this respect by Newmeyer v. Mayers, 35 C. C. 145.

The act provides, "that no proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof.

In the case of Newmeyer v. Mayer, supra, the original vendor secured judgment against his vendee, but the vendee of the fraudulent sale was not made party to the action nor were proceedings instituted against him in law or equity as required by the provision. It was then held the sale was good. The law in that case we adopt as the rule in the present proceeding. Taylor secured an absolute title of the goods by the delay of Rice in prosecuting.

It seems to me that the provision of the clause limiting the time in which action is to be brought to recover the goods is hardly sufficient. The vendor must first proceed against the vendee, the vendor of the fraudulent sale, then after securing judgment there must be an issue tried to determine the ownership of the goods. The vendor of the fraudulent sale should be summoned as the garnishee and thus brought into the cause immediately.

This is an action of trespass against Rice for disturbing the possession of Taylor's goods, the title of which was made complete and absolute at the expiration of ninety days unless action was brought against him within that time.

The attorney for the defendant contends that if any action for tres-

pass arises that the sheriff is the proper one to be brought in as defendant. Admitting that such an action might lie, that will not excuse the defendant in this action.

All who are concerned in the act of trespass are liable as principals and each trespasser is liable for the entire damages inflicted. 11 Barb, (N. Y.) 91.

The gist of the action is the wrong done to the plaintiff's possessions, and in this case such wrong has been committed. (17 Wend, N. Y.) 91.

In view of the doctrine laid down we therefore hold that the action of trespass will lie and hereby give judgment for the plaintiff.

OPINION OF SUPERIOR COURT.

The act of March 28th 1905 contain the proviso that no proceeding at law or in equity shall be brought against the purchaser to invalidate the sale, after the expiration of ninety days from the consummation of it.

It is quite clear that no proceeding was begun against the purchaser within ninety days. A suit was brought against the debtor, the vendor of the goods within the ninety days. But, while that may be a step towards contesting the title of the purchaser, it is not a contestation, nor a proceeding to invalidate the sale. It is predicated on a debt, and is as appropriate when the debtor has made no sale, whether in bulk or piecemeal, as when he has sold in bulk. Its purpose is to establish the debt, not to establish the right to take the goods in satisfaction of it. Newmeyer v. Mayers, 35 C. C. 145. In that case the inclusion of the vendee among the defendants in the action brought within the ninety days on the debt, (which was unsuccessful as to him but successful as to the vendor) did not constitute a proceeding to invalidate the sale within ninety days.

One proceeding to invalidate, the sufficiency of which has been recognized, is the issue of an execution within ninety days on a judgment against the vendor, and a levy thereon, within that time, upon the goods. Wilson v. Edwards, 32 Super. 293; Schmucker v. Lawler, 38 Super. 578; Swanson Grocery Co. v. Terwilliger, 34 C. C. 49; Newmeyer v. Mayers, 35 C. C. 145. This presupposes the recovery of a judgment for the debt within ninety days after the sale, a thing which is not always practicable.

It would however be practicable to issue an attachment at once under the act of 1869. Would that attachment be an available proceeding to invalidate the sale? That it is, is assumed by Bouton J. in Swanson Grocery Co. v. Terwilliger, 34 C. C. 49; by McCarroll J. in Newmeyer v. Mayers, 35 C. C. 145, and by Von Moschzisker J. in Albert Ochse Co. v. Drda, 16 Dist. 409, although a contrary view was taken by Newcomb J. 15 Dist. 141. The attachment however must indicate to the garnishee that the validity of the sale by him will be contested, or within the ninety days the sheriff must by interpleader give this notice;—34 C. C. 49.

It has been decided that an attachment execution is not available, since it can only be used to secure for the plaintiff, the property of the debtor, which is in the hands of the garnishee, a very strict and narrow conception of the meaning of the act,—Schmucker v. Lawler, 38 Super. 578.

That the court may not entertain a bill in equity by the creditor, to declare the sale void, and to appoint a receiver to take possession of the

goods and sell them, is decided by Von Moschzisker J. in Albert Ochse v. Drda, 16 Dist. 409, who therein dissents from the contrary opinion in Stowers Packing Co. v. Shoener, 15 Dist. 141. Archbald J. in the District Court of the United States thinks that a receiver could be appointed on a bill in equity, before the appointment of a trustee in bankruptcy, the proceedings in which (bankruptcy) have begun. Guarantee Title and Trust Co. v. Pearlman, 15 Dist. 696.

It is perhaps unfortunate that the act of 1905 does not indicate the mode in which the validity of the sale is to be attacked by the creditor.—Schmucker v. Lawler, 38 Super. 578; Albert Ochse Co. v. Drda, 16 District 409.

The only point in which the case before us differs from those in which t has been held that bringing suit within ninety days against the debtor, for the debt, is not instituting a proceeding to invalidate the sale, is that in this case, when the creditor brought suit against the debtor, he notified the purchaser from the debtor that he would levy on the goods as soon as he obtained this judgment. The judgment was not secured until four months after the purchase from the debtor. This notice is not a "proceeding at law or equity." It gave no right to the purchaser to intervene in the suit. He could not prevent or retard the recovery of the judgment. The title was not questioned by the suit. It was not questioned until a levy was made upon the goods, under the *fi. fa.* that was subsequently issued. The learned court below has properly decided that the title of the claimant, Taylor, cannot be now invalidated in pursuance of the act of 1905.

If there was actual fraud on the part of Taylor, the goods could still be taken in execution, independently of the act of 1905, but this fraud has not been found or alleged.

The case has not demanded of us a consideration of the constitutionality of the act of 1905. That its title is sufficient, is decided in Wilson v. Edwards, 32 Super. 295. That it does not violate the 14th amendment of the Constitution of the United States, is decided by Rice, P. J. in the same case. That it violates no part of the state constitution is likewise decided there, and in Feingold v. Steinberg, 33 Super. 39.

Judgment affirmed.

SARAH HARMAN V. RAILROAD CO.

Veligence—Railroad Crossing—Trespass for Personal Injuries.

STATEMENT OF FACTS.

William Harman, driving a team was obliged to cross the railroad. Within fifty feet of the track his horse, usually gentle and manageable, took fright at something, and dashed forward to cross the track, despite his effort to prevent. A train was coming at a great rate, fifty miles an hour, although the crossing was near a city, and was very often used each day by teams. Had it been running at the rate of fifteen or twenty miles an hour, the behavior of Harmon's horse could have been seen in time to arrest the train. The momentum and speed were so great that despite the efforts of the engineer and brakeman the train could not be

stopped soon enough to avert a collision. Harman's widow brings this action for his death.

WORST for Plaintiff.

GILBERT for Defendant.

OPINION OF THE COURT.

WILLS, J.—In this case these questions present themselves. Has the injury been caused by the negligence of the defendant? Was there any contributory negligence of the plaintiff? Would the negligence of the defendant, if any, have caused the accident had there been no contributory negligence of the plaintiff?

In approaching a crossing it is the duty of a railroad company to sound a whistle or give some notice of an approaching train so that travellers on or near the crossing may have reasonable opportunity to avoid danger. It distinctly appears that an omission to ring the bell or sound the whistle, if there was such an omission, could not have caused the accident. Even though this duty had been performed it would have been unavailing for the driver was unable to restrain his horse though he knew a train was coming.

There remains to be considered simply the speed of fifty miles an hour over a country crossing. Did it cause the accident? If so was it negligent in the company to run the train at that rate? An excessive rate of speed, though the company be negligent in maintaining it is not a ground of recovery, unless it has alone or in conjunction with other circumstances caused the accident.

A railroad company is permitted to move its trains at such rate of speed as the necessities of its business, or the requirements of the public may make necessary, and that right is subject only to such restrictions as may be found necessary in cities and populous towns. In the country the traveler over the wagon road may under all circumstances provide for his safety by compliance with the rules of law that require him to stop, look and listen. There is no maximum rate of speed at which a train shall be moved in the country, or any rate of speed that is negligence per se. 150 Pa. 76.

If a railroad company makes it safe for the public to cross the road by providing gates or a watchman it may run its trains at any rate of speed over such crossings it chooses. 111 Pa. 430.

In this case if the company had provided a watchman and had been running trains at the rate of fifty miles an hour it would simply have been exercising a privilege allowed by law. Now assuming that a watchman was stationed at the crossing when the train in question was approaching at fifty miles an hour the company would have fulfilled the requirements of the law, both in regard to speed and crossing protection. If, as in this case, the horse took fright at something and dashed madly upon the tracks in front of the train, could the company or its servant have prevented a frightened horse from running upon the tracks?

We think they could not.

If a railroad is allowed by law to run its trains forty-five or fifty miles an hour and an accident happens which could have been prevented

if the train was running only fifteen or twenty miles an hour we cannot on that ground impute negligence to the railroad.

We think such accidents are altogether unavoidable, and are not due to the negligence of the company for fast running. Was there any contributory negligence of the plaintiff? He was driving a usually gentle horse it is contended but it appears that he contributed to the accident in driving near the tracks with a horse he supposed to be gentle when in reality it was afraid of trains. In 49 Pa. 60 and 73 Pa. 504 we find a well established rule that the traveller must stop, look, and listen; such stopping etc. must not be merely nominal or perfunctory, but substantial, careful and in good faith. Because the plaintiff in this case was prevented from complying with the law by being suddenly pulled in front of a train by the action of his horse which he supposed to be gentle, we cannot impute the accident to the company. The failure to stop, look, and listen bars the actions of the plaintiff even though the horse was beyond his control for it was then a trespassing animal.

In 11 W. N. C. 369 it was held that where the driver of a horse approached a railroad crossing at night and his horse was frightened by an advancing train and dashed into the engine, killing itself and demolishing the buggy, the plaintiff's loss was the result of a pure accident which the railroad company could not have prevented.

In this case we think no care on the part of the company could have prevented what occured, which was a pure accident unavoidable by the company, and therefore there can be no recovery in damages by the plaintiff.

OPINION OF SUPERIOR COURT.

There is not the slightest evidence of contributory negligence, on the part of William Harman. His horse was usually gentle and manageable. He took fright at something, at what does not appear. The fright of the horse does not presuppose his driver's negligence. He dashed forward across the track, despite the efforts to restrain him. That those efforts were miss-chosen cannot be assured, nor that other efforts would have been more effectual.

The only question then is would the death of Harman have happened but for the negligence of the defendant? Was it negligent? Was its negligence the cause of the death?

The locality of the crossing was near a city. It was very often used each day. There was a likelihood then, that someone would be in the act of crossing, at the time of the approach of any particular train. This imposed the duty of giving warning of the oncoming of the train by whistling or the ringing of a bell. So far as appears, this duty was not neglected. It has been recognized that the rate of speed increases or diminishes the risk of collision. If the speed is high the time after a driver's or pedestrian's discovery of the approach of the train, before it is upon him may be too short to allow him to escape; too short to allow the engineer after his discovery of the object on the track to stop the train before a collision. The greater the speed the greater the momentum D. & L. W. R. R. v. Smith, 1 Walk. 88; P. & R. R. R. v. Long, 75 Pa. 257. Hence, the duty of adopting a moderate speed when drawing near to a

crossing in a populous neighborhood is recognized, and whether in view of its populousness; of the frequency with which the crossing is used, the speed actually employed by the railroad company, was negligently high, the jury must decide. "Whether" said Agnew C. J. "the population is dense or sparse, at the *locus in quo*, what is the likelihood of danger, and what the rate of speed compatible with the public safety, under the circumstances are facts which necessarily find their way out into the jury box" Penna. R. R. v. James, 81½ Pa. 193. The speed of the defendant's train in this case was fifty miles an hour, a rate so extreme that the court ought, almost to declare it excessive, even as matter of law, in view of the proven character of the vicinity. In any case it could not avoid allowing the jury to determine whether it was improper or not.—D. L. & W. R. R. v. Smith, Lehigh Valley R. R. v. Brandtmaier, 113 Pa. 610.

The other question is, was the speed, if excessive, the cause of the death of Harman? i. e. would he have been struck, had the speed been reasonable; had it been, e. g. but ten or fifteen miles an hour? Harman, had as the learned court below suggests, no control of his team. He might possibly have been able to leap from it, had there been time, after he first glimpsed the train, but whether he could have done so does not appear. It does appear that had the train been running at the rate of twenty miles an hour, the engineer could have arrested it in time to avoid the collision. This justifies us in saying that the speed above twenty miles an hour, was the cause of it. In Pennsylvania R. R. v. James, 81½ Pa. 199, the causal relation was held to exist, when it appeared that, had the train been running at the rate prescribed by ordinance, five miles per hour, the father of the child could, after perceiving the noise of the approaching train, have snatched it from the track. That persons on the track would have had time to leave it, between their first perceiving the approaching train, and its overtaking them, had the speed not been excessive was thought to make the excessive speed responsible for the death in Pennsylvania R. R. v. Lewis, 79 Pa. 33. Cf. Ellis v. R. R. 138 Pa. 506. Cf. McWilliams v. Keim, 22 W. N. 372. In P. & R. R. R. v. Long, 75 Pa. 257, a train going eight miles an hour struck a child on the tracks. Agnew C. J. considered the question soluble by the jury, whether she was not visible to the engineer in time, if the train had been going more slowly, to enable him to "reverse the engine before it came upon her." The duty of maintaining in drawing near important crossings, a "manageable rate of speed," that is, one which can allow of an arrest of the engine by its engineer in a reasonable time in case of need, is implied in Reeves v. D. L. & W. R. R. 30 Pa. 454.

We are unable therefore to reach the conclusion which the learned court announces and the judgment is reversed with a *v. f. d. n.*

JOHN SELIGMAN V. WILLIAM THORPE.

Trespass—Aviation—Injury to Subjacent Property.

STATEMENT OF FACTS.

Thorpe an aviator was flying an aeroplane at the height of five hundred feet, when, without negligence on his part, a portion of the machinery

broke and a piece of it fell on Seligman's house doing damage which it would require five hundred dollars to repair. He sues for the damages.

FETTERHOOF for Plaintiff.
MAUCH for Defendant.

OPINION OF THE COURT.

McCLINTOCK, J.—The plaintiff in this case seeks to recover on the ground that a trespass was committed by the sailing of the aeroplane through the air above his house and that the measure of damages is the injury done to his home. The defense contends that the property holder does not own all the space above him, and secondly that the air is in the nature of a high sea, thus giving persons the right to travel through it.

We are inclined to accept the defendants contentions with some slight modifications.

Lands have always been granted by and in this state in fee simple. Lands, or the property rights therein have not been, according to authority, confined to the mere crust of the earth, but have been said to extend, *in theory*, to the centre of the earth on the one extreme and to the sky on the other. This has always been, at least as regards the extension to the heavens, merely theoretical. and until the exigencies of this matter of fact and progressive century, the theory has never needed testing. In this land of large distances the doctrine of ancient lights has never been recognized, and since there is such an infinitely greater amount of space for vertical rays to reach the surface unimpaired by obstruction than for lateral rays, why should this theory exist here?

The land owner does not own the water in the stream flowing over his land, but has merely a use of it. If this stream is navigable, he must permit the passage of boats over it, even if, in theory, he owns the space occupied by the water. Why should not the same apply to the space above the earth? Give a man the right of use of so much as he needs and let the remainder vest in the public.

The true doctrine as was suggested by a southern court, and the only one fitted to our future condition, seems to be, that so much of the air above a man's land as he has need of, for building, for trees, or other purposes, is subject to his exclusive dominion and control; and an invasion of this property should be a trespass. The height required by each man must be determined by the circumstances of each case.

This doctrine is adopted by this court. The defendant was above any line needed by the plaintiff and consequently committed no trespass by his flight over the land.

We are living in a progressive and mechanical age. New inventions are constantly coming before the people; new means of travel and transportation are being perfected and in consequence the law must develop to protect them and to protect others against them. The air ship or aeroplane, is one of these. It has been dreamed of for years. The days of Darius Green are passed. It is now here to stay. While it is not as yet perfected, the time is soon to come when the mastery of the air will be completed, or as nearly so as is that of the sea. As before stated, no man, because he owns the land, over which water flows, has the exclusive ownership of it. He has a right to use it; so do others. If naviga-

ble, the public can legally float boats upon it. The law says, "if you can navigate water, you have a right to do so. The time is at hand when the air is to be "navigated." It is probable that travel through the air will supersede travel by rail or sea craft. Since air has become, through inventive genius, "navigable" why should not the same rule as applicable to water be recognized? In this respect it is in the nature of a high sea, and subject to many of the same rules. Since this is so, the defendant had a right to sail over Seligman's land without committing a trespass.

The sinking of a ship at sea injures no property beneath it. It is swallowed up. No damage could be estimated. But the case of a wreck in the air might be very different. To protect the owner below the air craft, strict rules of negligence will need to be applied. In this case no negligence is alleged, so we will disregard that subject here, and leave it to be decided when occasion demands it.

Should the person whose property or person has been injured, through no fault of his own, be made to suffer alone without any legal remedy? While a negative answer would at first appear correct, it would not be so. When an injury has been done another through no fault of his own, with no negligence or malice on the part of the person who caused the injury, should the injured person bear the loss himself? Such is the law. An injury to another's property, caused without negligence or malice is *damnum absque injuria*. It is a wrong done for which the law provides no remedy.

The protection and control of aerial navigation is one which vitally affects the public. In the future before such a conquest the methods of transportation will be revolutionized. Here as in other cases, as for instance in the coal industry, private inconvenience must yield to public necessity. "A rule which casts upon an innocent person the responsibility of an insurer is a hard one at best, and will not be generally applied unless required by some public policy or the contracts of the parties." Pa. Coal Co. vs. Sanderson, 113 Pa. 126. To give judgment for plaintiff in this case would be casting such a burden upon the defendant, where public policy not only does not require it, but on the other hand requires his protection. As the facts stand, the rule *damnum absque injuria* applies.

Plaintiff's counsel has cited cases in which damages have been awarded for the dropping upon land of water from the eaves of adjoining buildings, 110 Mass. 302; and for the throwing of stones on a man's land from without, 2 N. Y. 159. These cases show either a negligence in construction or in theory, or perhaps malice. They do not apply in this case nor are they conclusive in this state.

The only case at all in point is that of Guilk vs. Swan, 19 Johnson 381. Here the defendant ascended in a balloon, for show purposes; in descending he suffered an accident and was dragged through a garden, causing some injury. He called for help and the crowd which had gathered to watch him broke into the enclosure, causing considerable damage. Defendant alleged he was answerable only for the damages done by his balloon, but the court entered judgment against him for all the damage done, on the ground that he invited the destruction of the garden by calling for help. This happened in 1822, before travel by air was seriously

considered. No need of reconsideration of old common law theories had arisen. It is too old a case to apply at this time even if it were in point. The circumstances of this case and the one at bar are too dissimilar to apply now.

Our conclusion is that a land owner has no absolute, but merely a theoretical ownership of all the space above his land, that the air above the earth is somewhat in the nature of the high seas, and consequently aeroplanes have the right to pass over the land, and in the absence of negligence, any injury to the land resulting therefrom is *damnum absque injuria.*

OPINION OF SUPERIOR COURT.

"Land hath also" says Blackstone, 2 Comm. p. 18; "in its legal signification, an indefinite extent, upwards as well as downwards, *Cujus est solum ejus est usque ad coelum,* is the maxim of the law." But this is nothing but a dictum. The cases actually before courts, have concerned acts done only a very small distance above the surface of the earth. The inference drawn from the maxim by Blackstone is that "no man may erect any building, or the like, to overhang another's land." Ibid.

The limbs of a tree growing on B's land may be cut off by A if they project across the boundary between B's land and his. Minor & Wurts, Real Prop. 16. Telegraph or Telephone wires may not be streched over A's land without his consent, unless compensation is made to him. Ibid.

But there are probably no cases in which the land-owners right has been recognized, to prevent the passage or to obtain damages for the passage at a great distance over the land of a bullet shot from a gun, or of a sky rocket, or of a balloon. When the maxim was formulated, no need was felt to distinguish between invasions of the space over lands which were near to the surface, and invasions at great elevations. It will not be possible to sharply distinguish the height within which, and those beyond which invasions will be deemed actionable. It is enough for the present to say that a transient invasion at the height of three or four hundred feet, at the present stage of civilization, cannot be deemed an actionable trespass. To hold it so would be in the highest degree preposterous. There are already invasions of closes, e. g. by dogs, and by travellers who find the highways impassable, for which the courts have chosen to allow no damages. It would strike the ordinary man as eccentric and ludicrous to hold that if an aviator flew at a great height across X's land he did any act of which X could successfully complain.

Thorpe had exposed himself to no action, when he merely sailed within the planes which extended upwards toward the sky through the superficial boundaries of the land from the centre of the earth. An accident however occurred while he was there. A part of the machinery fell upon Seligman's house, but without Thorpe's negligence. Is he liable for the injury thus caused?

There are cases which hold that for damages to A's property caused by B without negligence, in the prosecution of a lawful business, he is not liable to make compensation. Baran v. Reading Iron Co, 202 Pa. 274; Pa. R. R.v. Lippincott 116 Pa. 462. There are others which maintain that there is such liability; Pottstown Gas Co. v. Murphy, 39 Pa. 257; Houck

v. Pipe Line Co. 153 Pa. 366; Rogers v. Phila. Traction Co., 182 Pa. 473; Robb v. Carnegie, 145 Pa. 324.

While we concede to aviators the right to navigate the air at proper heights, we think it fit that they should do so under the condition that for any injuries caused to the property or persons on the surface of the earth, they should be liable to make compensation, whether they have acted skillfully and carefully or not. The human race has thus far got along without aerial navigation. Its use on a large scale will in any case, lead to grave damages and frequent losses to the less ambitious and aspiring dwellers on the soil. It is little to give then a right of compensation, when the aviator can be caught, and proves solvent, whose exploits in the air have produced the mischief.

To adopt the principle that the absence of negligence would prevent liability, would unless accompanied by the further principle that the occurrence of an accident should be *prima facie* evidence of negligence, be highly inconvenient. The plaintiff would often have no means of knowing what the cause of the accident was and whether there was negligence or not, except the testimony of the aviator himself or of the passengers.

The time may come when the art and instruments of aviation will be so far perfected that accidents will be rare. It will then be early enough to relax the rule of liability in favor of the careful operator.

As to the measure of damages, it may be said that, the injury to the house being reparable, the cost of the reparation $500 will be the measure of damages, *plus* the value of the use of the premises lost meantime unless this cost exceeds the difference between the market value of the premises before and that value after the infliction of the injury. Weaver v. Berwind—White Coal Co., 216 Pa. 195; Rabe v. Shoenberger Coal Co. 213 Pa. 252.

The philosophical opinion of the learned court below sufficiently vindicates its conclusion that sailing through the air over a man's land is no trespass. We are not able to go farther with it and hold that for injury to the subjacent property there will be no liability, unless the avitor has been negligent.

Judgment reversed with *v. f. d. n.*